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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 264

MONTGOMERY WARD & CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Petitioner in Reply

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QUESTIONS PRESENTED

The petition stated four questions presented by this record. (Pet. 3). The first two raised fundamental issues in the interpretation of the National Labor Relations Act as amended. The last two questioned whether the Board's findings were supported by substantial evidence.

The brief in opposition omits the first two questions. It restates the last two and seeks to confine the issues to them (Resp. Br. 2, 9). It thus ignores the most important reasons why the petition was filed.

Petitioner reiterates here its reliance on Questions 1 and 2 in the petition as grounds for the allowance of the writ.

ARGUMENT

Contrary to respondent's argument, this is not a case involving only, or even primarily, the question of substantial evidence. Fundamentally, it is a case involving the question whether the National Labor Relations Board can ignore the clear distinction between supervisor and employee, laid down in Sections 2(3) and 14(a) of the Act (Pet. App. 1-A, 5-A), and compel an employer at his peril to silence the private remarks of an employee entitled to vote as a member of the bargaining unit.

Respondent asserts that even without the remarks by Du Four (the department head who voted in the election as an employee) "the other circumstances surrounding the dismissals *would have furnished* ample basis for the findings of discrimination." (Resp. Br. 10, emphasis added). That is not the point. The Court of Appeals may not, as it has here, hold that it will sustain the Board on the basis of findings which the Board might have, *but did not*, make. So to hold is to substitute the Court's judgment for the Board's. The Court must accept the Board's findings and enforce or deny enforcement on that basis.

Respondent's own brief shows that the Board failed to make the findings which respondent now says it could—and inferentially should—have made.

1. Respondent says that "the Board could reasonably infer that his [Du Four's] statements reflected management's views and that he communicated his knowledge of employee union activity to management." (Resp. Br. 10). By this means respondent seeks to ascertain "the motives of the supervisors who actually did the discharging." (Resp. Br. 8).

Whether or not the Board could so "infer", which petitioner denies, the fact is that it did not so "infer" at all. Instead, it sought to substitute a rule of law—that a voting supervisor's knowledge and intent, but not his acts, will be *legally imputed* to management—for the finding of management motives required under Sec. 8(a)(3) (R. 391). Whether the Act permits the Board thus to substitute a rule of law for a finding on "a pure question of fact" (Resp. Br. 10) is the issue under the first question presented. (Pet. 3).

2. Respondent says that petitioner argues that "the Board was estopped from considering Du Four as an arm of management" (Resp. Br. 11), and dismisses this supposed petitioner's argument by saying that "agreements between private parties cannot restrict the jurisdiction of the Board." (Resp. Br. 12).

This argument misunderstands the issue.

Petitioner did not and does not argue that "the Board was estopped." Petitioner's argument is that the Board made a determination of Du Four's status on which petitioner was obligated to rely *until it was set aside for the future*. (Pet. 21). That is a very different thing.

This is not a case where parties are seeking to restrict the jurisdiction of the Board. It is a case where the Board is seeking to restrict its own jurisdiction by hiding behind a so-called private agreement. The Act commits to the Board, not private parties, the conduct of elections (Sec. 9(c), Pet. App. 2-A). The Act requires the Board, not private parties, to determine the bargaining unit (Sec. 9(b), Pet. App. 2-A). The Board's agent conducted the election involved in this case pursuant to its procedures and regulations (Pet. App. 5-A to 10-A), and certified the results "with the same force and effect as if issued by the

Board." (Pet. App. 9-A). Determination of those eligible to vote as members of the bargaining unit was a necessary part of such conduct of the election. The Board had no power to delegate this or any other statutory duty irrevocably to private parties. *N.L.R.B.* v. *Southeastern Rubber Mfg. Co.* (C.A. 5th, 1954), 213 F. 2d 11, 15. It cannot now escape the consequences of its own past exercise of statutory jurisdiction in the case of Du Four.

Determination of the question of membership in the bargaining unit was inherent in the Board's conduct of the election. Whether such determination may now be retroactively ignored is one of the basic issues under the second question presented in this case (Pet. 3).

Respectfully submitted,

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